



The Legislature of the State of Texas finds that. . . .

the adoption of certain modifications in the medical, insurance, and legal systems, the total effect of which is currently undetermined, will have a positive effect on the rates charged by insurers for medical professional liability insurance. . . .

it is the purpose of this article to improve and modify the system by which health care liability claims are determined in order to. . . .

make affordable medical and health care more accessible and available to the citizens of Texas. . . . *Section 10.11, H.B. 4*

Wide-Ranging Reforms in Texas Tort Law

During the regular session, the 78th Legislature enacted H.B. 4, a comprehensive bill affecting many areas of the Texas civil justice system, including a wide variety of procedures and remedies in civil actions. This publication seeks to highlight and summarize many of the major changes made by this legislation relating to class actions, offer of settlement, consolidated or coordinated pretrial procedures, venue and forum non conveniens, proportionate responsibility, products liability, interest, appeal bond, seat belts and car seats, health care, public servants and volunteers, damages, asbestos-related liabilities, design professionals, and trespass.

Class Actions. The Texas Supreme Court is required to adopt rules providing for the fair and efficient resolution of class actions on or before December 31, 2003. These rules must provide that:

- any attorney's fees awarded must be calculated using the "Lodestar" method (number of hours reasonably expended by the attorney multiplied by the prevailing hourly rate in the community for similar work and adjusted to reflect other factors, such as the contingent nature of the suit and quality of representation). A trial court may be granted discretion to increase or decrease this fee by no more than four times, based on certain specified factors;
- attorney's fees awarded must be in cash and noncash amounts in the same proportion as the recovery for the class, if any portion of the benefits recovered for a class are in the form of noncash benefits; and
- trial courts must, before hearing or deciding a motion to certify a class action, hear and rule on all pending pleas to the jurisdiction asserting that a state agency

has exclusive or primary jurisdiction of the action or a part of the action or that a party has failed to exhaust administrative remedies. If this plea to jurisdiction is denied and the action is later certified as a class action, a person appealing the certification of the class action may also, as part of that appeal, seek appellate review of the order denying the plea to jurisdiction.



The Texas Supreme Court is authorized to review an appeal from an interlocutory order certifying or refusing to certify a class action. (An interlocutory order is an order issued by a court concerning a specific issue in a lawsuit, usually procedural, that does not decide the entire controversy before the court.) The appeal of an interlocutory order regarding certification of a class action and certain other interlocutory appeals stay all other proceedings in the trial court until the appeal is resolved.

Offer of Settlement. A party in certain actions for monetary relief may make a settlement offer.

If the other party rejects the offer and the judgment is significantly less favorable to the rejecting party than the offer, the offering party is entitled to recover from the rejecting party litigation costs incurred by the offering party after the date the other party rejected the settlement offer. A judgment is deemed significantly less favorable if the rejecting party is a claimant and the award will be less than 80 percent of the rejected offer or the rejecting party is a defendant and the award will be more than 120 percent of the rejected offer. The litigation costs awarded may not exceed the sum of 50 percent of the economic damages, 100 percent of the noneconomic damages, and 100 percent of the exemplary or additional damages to be awarded, less any statutory or contractual liens. Before these offer of settlement procedures may be applied, a defendant must file a declaration that such settlement procedure is available in the action. The supreme court must promulgate rules implementing these offers of settlement provisions no later than January 1, 2004, and H.B. 4 sets forth what these rules must include.

Consolidated or Coordinated Pretrial Procedures. H.B. 4 authorizes the state supreme court to adopt rules relating to the transfer of related cases for consolidated or coordinated pretrial proceedings and creates the judicial panel on multidistrict litigation, with the authority to transfer civil actions involving one or more common questions of fact pending in the same or different courts to any district court for consolidated or coordinated pretrial proceedings. This panel must operate according to rules adopted by the supreme court, and H.B. 4 sets forth what these rules must include.

Venue and Forum Non Conveniens. H.B. 4 makes a number of changes regarding where an action may be brought. In a case with multiple plaintiffs, if any plaintiff cannot independently establish proper venue, that plaintiff's part of the suit must be transferred to the proper venue or

dismissed. An interlocutory appeal may be taken of a court's determination regarding whether a plaintiff properly established venue, and such an appeal stays the commencement of the trial. A health care liability claim may be brought against certain hospital districts only in the county in which the hospital district is established. H.B. 4 retains the existing test regarding the doctrine of forum non conveniens (procedure authorizing a court to stay or dismiss a lawsuit that would be more appropriately filed in another jurisdiction).

Proportionate Responsibility. H.B. 4 expands provisions regarding proportionate responsibility of defendants to include actions brought under the state's Deceptive Trade Practices-Consumer Protection Act (DTPA), authorizes a defendant to designate a person as a responsible third party, and sets out the procedure for designating such defendants. A responsible third party is defined as any person who is alleged to have caused or contributed to the harm for which recovery of damages is sought. Designating a person as a responsible third party does not impose liability on the person, and the designation may not be used in other legal proceedings to establish liability. The bill also establishes the procedure for designating an unknown person as a responsible third party if the defendant alleges that an unknown person committed a criminal act that was a cause of the loss or injury. The state supreme court is required to amend the Texas Rules of Civil Procedure to include disclosures of the name, address, and telephone number of persons designated as responsible third parties.

If a claimant has settled with one or more persons, the court is required to reduce the amount of damages to be recovered by a percentage equal to each settling person's percentage of responsibility. However, in a health care liability claim, a defendant can elect, before the issues are submitted

to the trier of fact, to require that damages be reduced by either the sum of the amounts of all settlements or a percentage equal to each settling person's percentage of responsibility as found by the trier of fact. Also, under the bill, each defendant is jointly and severally liable for the damages if the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in specific provisions of the Penal Code, proximately causing the damages. In workers' compensation claims, an insurance carrier's subrogation interest (the interest of the carrier, after paying the claim to the insured, to recoup the amount from the party responsible for the harm) is limited to the amount of the total benefits paid by the carrier less the amount the judgment is reduced based on the percentage of responsibility attributable to the employer.

Products Liability. A claimant must commence a products liability action against a manufacturer or seller of a product within 15 years after the date of the sale of the product by the defendant unless the manufacturer or seller expressly warrants in writing that the product has a longer life. However, this provision does not apply to a products liability action seeking damages for personal injury or wrongful death in which the claimant alleges that the claimant was exposed to a product, that the exposure caused the claimant's disease, and that the disease did not manifest itself before the end of 15 years.

A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves that:

- the seller participated in the product's design, modified or installed the product, or took other specified action that resulted in the claimant's harm; or
- the product's manufacturer is insolvent or not subject to the court's jurisdiction.

These provisions regarding the liability of nonmanufacturing sellers do not apply to the sale or lease of motor vehicles.

H.B. 4 creates a rebuttable presumption in certain products liability claims that the defendant is not liable if:

- in an action concerning the failure to provide adequate warnings or information with regard to a pharmaceutical product, the warnings or information were approved by the United States Food and Drug Administration (FDA); or
- in an action brought against a product manufacturer or seller, the formulation, labeling, or design of a product complied with federal mandatory safety standards or regulations or was subject to premarket licensing or approval by the federal government. This does not extend to manufacturing flaws or defects, even though the product manufacturer has complied with quality control and manufacturing practices mandated by the federal government.

Regarding pharmaceutical products, a claimant, to rebut the presumption, must establish that:

- the defendant withheld or misrepresented information required by the FDA that was material and relevant to the performance of the product and was causally related to the claimant's injury;
- the pharmaceutical product was sold or prescribed by the defendant in the United States after the FDA ordered the product to be removed from the market or withdrew its approval of the product;
- the defendant recommended, promoted, advertised, or prescribed the pharmaceutical product for an indication not approved by the FDA and the claimant's injury was causally related to such use of the product; or
- the defendant engaged in bribery of public officials or witnesses, causing the warnings or instructions approved by the FDA to be inadequate.



In a products liability action, the consumer, in order to rebut the presumption, must establish that:

- the standards or regulations applicable to the product, or the procedures used in the premarket approval or licensing process, were inadequate to protect the public from unreasonable risks of injury or damage; or
- the manufacturer withheld or misrepresented to the government information relevant to the government's determination of the adequacy of the standards or regulations or to the performance of the product.

Interest. H.B. 4 establishes the postjudgment interest rate and provides that prejudgment interest may not be assessed on an award of future damages.

Appeal Bond. The bill provides that in a money judgment, the amount of security a defendant must post for an appeal must equal the sum of the amount of compensatory damages, costs awarded, and interest for the estimated duration of the appeal. However, the amount of such security may not exceed 50 percent of the judgment debtor's net worth or \$25 million, whichever is less. Upon a showing that the judgment debtor is likely to suffer substantial economic harm if required to post security in such an amount, the court must lower the amount of the security. The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, provided the order does not interfere with the debtor's normal course of business.

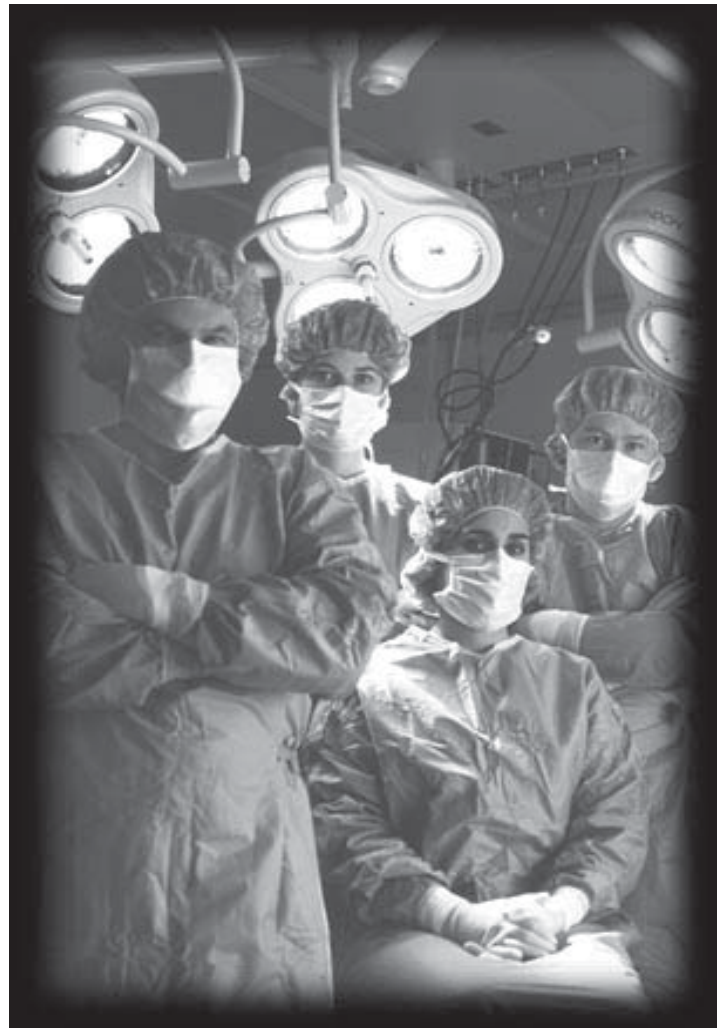
Seatbelts and Car Seats. Statutes barring the introduction into evidence of the use of a seatbelt or child car seat are repealed.

Health Care. The bill sets forth legislative findings concerning a medical malpractice insurance crisis in Texas. These findings link the rise in the frequency of filing and the size of awards in health care liability claims to increases in medical professional liability rates. The findings assert that this has caused a serious problem in availability and affordability of medical professional liability insurance and adversely affects the delivery of medical and health care in Texas. The stated purpose of the bill's modifications to the civil justice system regarding health care liability claims is to reduce the frequency, severity, and cost of such claims in order to make affordable medical and health care more accessible to Texans. The intent of the legislature is that these modifications regarding health care liability claims do not extend to any other area of the Texas legal system.

The most publicized and discussed issue among the many changes H.B. 4 made to litigation regarding

health care liability is the capping of noneconomic damages in health care liability claims. In a claim where final judgment is rendered against:

- a physician or health care provider, the physician's or provider's liability for noneconomic damages is limited to \$250,000 for each claimant;
- a single health care institution, the institution's liability for noneconomic damages is limited to \$250,000 for each claimant; and
- more than one health care institution, each institution's liability for noneconomic damages is limited to \$250,000 for each claimant and the liability of all health care institutions together is limited to \$500,000 for each claimant.





"Noneconomic damages" means damages for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses other than exemplary damages. "Claimant" means a person, including a decedent's estate, who is seeking or who has sought recovery of damages in a health care liability claim; all persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant. In the event these limits on noneconomic damages are invalidated, alternative limits on noneconomic damages become effective if the physician or health care provider meets certain financial responsibility requirements. Damages in a wrongful death or survival action on a health care liability claim against a physician or health care provider are also capped at \$500,000 for each claimant. This limit is adjusted for increases or decreases in the consumer price index.

This is not the first time the legislature has tried to cap medical malpractice damages. In 1977, the Medical Liability and Insurance Improvement Act of Texas (MLA) implemented a \$500,000 cap on all damages, except for medical expenses, in health care liability claims. Subsequently, the Texas Supreme Court held that this limitation on damages was unconstitutional as applied to common law causes of action because it violated the "open courts provision" of the Texas Constitution, which grants every person a right to seek redress in the state courts for injuries to property or person. In a bid to avoid this constitutional issue, the 78th Legislature enacted H.J.R. 3, which requires the submission to the voters of a constitutional amendment authorizing the legislature to determine limits for noneconomic damages in health care liability claims and other causes of actions. This

constitutional amendment was adopted by the voters on September 13, 2003. H.B. 4 also provides for the accelerated appeal of any constitutional challenge to its provisions regarding health care liability.

Another potential constitutional issue arises from provisions that impose a statute of repose and a statute of limitations regarding health care liability claims. H.B. 4 implements a statute of repose requiring that any health care liability claim must be brought no later than 10 years after the date of the act or omission that gives rise to the claim. The bill also incorporates the statute of limitations under MLA, which requires that any health care liability claim must be filed within two years from the occurrence of the injury or from the date the medical or health care treatment is completed. (Generally, a statute of repose applies to any possible claims that might arise following a specific event, while a statute of limitations applies to a specific claim or injury.) The Texas Supreme Court has ruled that the two-year statute of limitations under MLA violated the "open courts" provision of the Texas Constitution to the extent that the statute barred a plaintiff from bringing a medical malpractice claim before the injured party had a reasonable opportunity to discover the injury.

There are other provisions in H.B. 4 affecting awards for medical malpractice. When the award of future damages in a health care liability claim exceeds \$100,000, the court is required to order that the award be paid in periodic payments at the request of a party. The bill sets forth the procedures and requirements for such periodic payments. Monetary damages in any civil action brought against a hospital or hospital system are limited to \$500,000 if the patient or person responsible for the patient signs a written statement acknowledging that the hospital is providing care without expectation of compensation and setting out limitations on damages from the hospital in exchange for receiving the health care services.



The bill makes a number of changes to the procedures regarding medical malpractice claims. Notice of a health care liability claim must now be accompanied by a form authorizing the health care provider to obtain and disclose protected health care information so that the provider can investigate and evaluate the claim and defend against any litigation arising out of the claim. H.B. 4 sets forth the requisite authorization form. A claimant must now file, within 120 days after the claim is filed, an expert report (a written report by an expert regarding the expert's opinion concerning how the standard of care rendered by the physician or health care provider failed to meet applicable standards and the causal relationship to the harm suffered by the claimant). Generally, such experts must be physicians or persons in the same occupation as the health care provider. The bill sets out various procedures

regarding such reports. Other procedural issues in H.B. 4 include a requirement that the plaintiff in a health care liability action to serve interrogatories on the defendants within 45 days after a claim is filed and the qualifications of expert witnesses. (Generally, an expert on deviation from the standard of care must be actively practicing and rendering health care services relevant to the claim, and an expert on causation must be a physician or a person in the same occupation as the health care provider.)

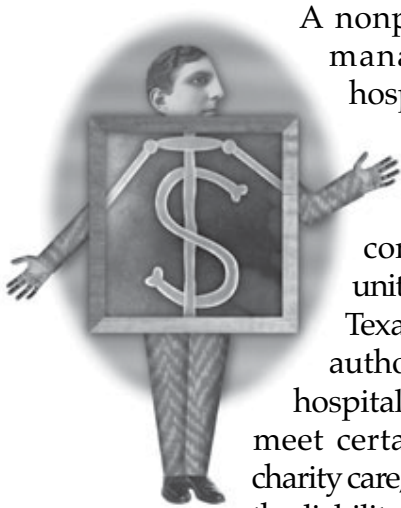
In a health care liability suit regarding emergency care, the claimant must show by a preponderance of the evidence that the health care provider, with wilful and wanton negligence, deviated from the degree of care and skill reasonably expected from a prudent health care provider in similar circumstances. The bill also sets forth jury instructions to be given in cases involving emergency care.

Other provisions in H.B. 4 include:

- providing that DTPA does not apply to physicians or health care providers with respect to claims for personal injury or death alleging negligence;
- providing that any agreement to arbitrate a health care claim is invalid unless such an agreement contains certain language and is also signed by a patient's attorney;
- limiting the admission of evidence regarding certain actions by the Texas Department of Health (TDH) against a nursing home and related institutions in civil actions; and
- incorporating certain sections currently under the MLA.

Public Servants and Volunteers. The bill makes a number of changes expanding the limitations on liability regarding public

servants and volunteers. Health care providers are included under certain laws limiting the liability of public servants. The bill limits the liability of volunteer firefighters providing an emergency response.



A nonprofit municipal hospital management contractor or hospital district management contractor under contract with a municipality or hospital district is considered a governmental unit for purposes of liability. The Texas Department of Health is authorized to certify nonprofit hospitals or hospital systems that meet certain criteria for providing charity care, and such certification limits the liability of the hospital or hospital system for noneconomic damages.

A claimant under the Texas Tort Claims Act must now elect to bring suit either against a governmental unit or an employee but is barred from bringing actions against both.

The bill also amends existing law limiting the liability of professional employees of a school district by setting out notice and procedural requirements.

Damages. H.B. 4 defines a number of terms relating to damages, including compensatory damages, exemplary damages, noneconomic damages, and gross negligence. A unanimous jury

finding is required for exemplary damages. The bill provides that the statutory limit on exemplary damages covers injury to a child, an elderly individual, or a disabled individual that occurred while health care was being provided. H.B. 4 also establishes the burden of proof for recovery for certain economic losses such as loss of earnings or earning capacity.

Asbestos-related Liabilities. H.B. 4 limits the liability of certain successor corporations for the asbestos-related liabilities of a corporation acquired through merger or consolidation to the fair market value of the total gross assets of the acquired corporation and establishes procedures for determining fair market value.

Design Professionals. Design professionals are defined as registered architects or licensed professional engineers. A plaintiff, in any action for damages alleging professional negligence by a design professional, must file an affidavit by a registered architect or a licensed professional engineer setting forth the negligent act, error, or omission.

Trespass. An owner, lessee, or occupant of real property is liable for trespass as a result of migration or transport of any air contaminant, other than odor, only upon a showing of actual and substantial damages.

—by Sharon Hope Weintraub

